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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES, et al.,

Petitioners,

v.

CROW TRIBE OF INDIANS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[redacted]**D BRIEF OF AMICI CURIAE, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY AND GILA RIVER INDIAN COMMUNITY IN SUPPORT OF THE RESPONDENTS**

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The Salt River Pima-Maricopa Indian Community and the Gila River Indian Community hereby move for leave to file an amici curiae brief in support of the Respondents, Crow Tribe of Indians, et al., in the instant case. The proposed brief accompanies this motion. Amici have received the consent of the Petitioner herein, National Farmers Union Insurance Companies. The Respondent Crow Tribe of Indians was not represented by counsel at the time this motion and brief were written, and therefore consent of the Respondents has not been obtained.

Amici, who are Indian communities located in Arizona, are interested in the outcome of this case because of the potential effect of this decision on jurisdiction within Indian country. Amici have a particular interest in the jurisdiction of their tribal courts because virtually all of the land within its borders is allotted or tribal land.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The Salt River Pima-Maricopa Indian Community and the Gila River Indian Community are participating as amici curiae because of the substantial impact that a reversal or modification of the decision below would have upon these Indian tribes and their people. Each of these Indian tribes is organized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. § 476.

The Salt River Pima-Maricopa Indian Community and the Gila River Indian Community maintain sophisticated governmental systems including court systems that deal with

civil and criminal matters. It is of the gravest importance to these communities that the legitimacy of their governance of affairs within their reservations ought not to be open to question.

A. THE INTEREST OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

The Salt River Pima-Maricopa Indian Community is composed of 4087 Indian people who trace their ancestry in the Salt River Valley back to 300 B.C. In 1879 the Reservation for the Salt River Pima-Maricopa Indians was established by Executive Order, and since 1940 tribal government has been conducted pursuant to the Indian Reorganization Act of 1934.

The Salt River Community consists of 52,729 acres of land in allotted or tribal status (except for 25.27 acres about which arrangements have been made to return the land to Indian ownership). Despite its location within the Phoenix metropolitan area, the Salt River Pima-Maricopa Indian Community has managed to preserve its land base with almost no fee lands within its borders. It is the firm policy of the Community to maintain this status containing within Community lands the economic development occurring on the areas of the Community that abut the Phoenix metropolitan area.

Scottsdale Community College is located just within the Community near its western boundary. Non-Indians from neighboring cities constitute the great majority of the students. Various businesses owned by non-Indians are located on leased allotted and tribal land. Approximately one-half of the arable land within the Community is under cultivation with the majority of the cultivated land leased to non-Indians. Such activity is a source of income for the Community as well as individual allottees.

Although the Salt River Pima-Maricopa Indian Community has kept the non-Indian population within the Community to a transitory minimum, it has never been possible for the Community to ignore the non-Indian population on all sides.

The Salt River Pima-Maricopa Indian Community has enacted ordinances that assert civil jurisdiction over non-Indians who have entered into consensual relationships with the Community or its members through commercial dealings or otherwise cause an actionable event to occur within the Community. These jurisdictional ordinances are an integral part of successful relationships between the Community and its members and the non-Indians who come upon the Community lands.

B. THE INTEREST OF THE GILA RIVER INDIAN COMMUNITY

The Gila River Indian Reservation encompasses approximately 372,000 acres and is located in the south central Arizona counties of Pinal and Maricopa just north of the City of Phoenix. The Community is inhabited by two Indian tribes, the Pimas and Maricopas, with a total population of approximately 7,000. Pimas have lived in the same geographical area for over two thousand years. Most of the 300 non-Indians living within the external boundaries of the reservation are employees of the Bureau of Indian Affairs or the Indian Health Service.

The interstate highway which links Phoenix and Tucson intersects the Gila River Indian Reservation. Large numbers of non-Indians cross the reservation, work on its farms and industrial plants, and visit its recreational areas. There are approximately thirty-two non-Indian owned businesses on the reservation employing approximately 650 persons of whom approximately half are non-Indians.

The Pima and Maricopa people of the Gila River Indian Community have historically been an agricultural people. Using their limited water resources, they have developed a substantial tribal farm. Additionally, land has been leased to non-Indians for farming purposes. The Community has developed three industrial parks. Major recreation areas have been developed to the southeast of Phoenix, and a museum,

arts and crafts center and restaurant lie off the main interstate highway near Sacaton.

The Pima and Maricopa Indians of the Community, who have since time immemorial maintained a system of self-government, organized and incorporated as the Gila River Indian Community pursuant to the Indian Reorganization Act of 1934. The constitution enables the Community to enact ordinances which apply to Indians and non-Indians alike.

As a consequence of the close proximity to the large urban non-Indian population and the interaction engendered thereby, the number of civil filings in the Community court involving transactions between Indians and non-Indians is large. The Community Law and Order Code provisions applicable to non-Indians include those relating to marriage and divorce, child custody, business licenses, taxes on the transaction of business, sale of liquor, control of livestock, building codes and control of cotton pests and use and sale of fertilizers and animal feed.

The ordinances of the Gila River Indian Community which apply to all persons within the territory of the Gila River Indian Reservation recognize the basic understanding of the people of the Gila River Indian Community that all persons within the external boundaries of the reservation ought to be dealt with by the same standard of law and protected by the same principles of justice. Within the cloak of the Indian Civil Rights Act of 1968 and the Constitution of the Gila River Indian Community, the ordinances of the Gila River Indian Community are designed to accord such fair and equal treatment to all people.

SUMMARY OF ARGUMENT

The courts of the Salt River Pima-Maricopa Indian Community and the Gila River Indian Community, as well as other Indian communities, have retained inherent sovereignty to exercise civil jurisdiction over civil disputes including non-Indians on the reservation. Federal case law does not restrict Indian tribal courts from asserting civil jurisdiction over non-Indians whose activities within the tribal reservation concerning Indian tribes or tribal members even on fee lands within the reservation cause some actionable event to occur. In cases involving the adjudication of such private disputes no federal common law exists which supports district court federal question jurisdiction. Principles of comity require that great restraint be exercised by the federal courts before permissible intervention.

ARGUMENT

I. RECOGNITION IN THIS CASE OF A CIVIL CAUSE OF ACTION ARISING UNDER FEDERAL COMMON LAW WOULD BE CONTRARY TO CONGRESSIONAL INTENT

Indian tribes are not constrained by the provisions of the Fourteenth Amendment of the United States Constitution (*See Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980)). The Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, however, requires tribal courts to follow due process and equal protection guidelines in exercising their jurisdiction. Congress addressed the issue of federal court interference with tribal court proceedings in this Act and limited review by the federal court to petitions for habeas corpus. Petitioner is asking that this Court expand this sole and exclusive remedy without any statutory authority or federal case law to support such a determination.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court refused to imply a federal remedy in addition to habeas corpus. The *Martinez* Court recognized major congressional purposes behind the Act to be the protection of tribal sovereignty from undue interference (*Id.* at 63) and strengthening tribal courts (*Id.* at 64) as well as protection of individual rights. Judicial expansion of the exclusive remedy allowed in the Act was not, however, mandated by recognition of dual congressional objectives.

> Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesi-

tant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. *Id.*

Martinez established that under the statutory scheme and legislative history of the Indian Civil Rights Act, Congress' failure to provide remedies other than habeas corpus was deliberate and that a "judicially sanctioned intrusion into tribal sovereignty" would not be required to accomplish the Act's purposes (*Id.* at 61) (cf. *Illinois v. City of Milwaukee*, 406 U.S. 91, 104 (1972) where this Court found that application of federal common law to abate a public nuisance in interstate waters *was consistent* with the Water Pollution Control Act). There is no federal common law to support federal question jurisdiction over a claim of abuse of tribal adjudicatory jurisdiction.

Nor does *Montana v. United States*, 450 U.S. 44 (1981) state a rule of federal common law that would assist petitioner in finding jurisdiction in the District Court. *Montana* dealt only with the jurisdiction of a tribe to regulate activities within a reservation and the Court determined that as to the regulatory powers of the Crow Tribe, different standards apply to the activities of non-Indians depending upon whether the activities occurred on tribal or fee land. There is no tribal regulation here as to which enforcement is sought. A private action is being adjudicated in the court of the locality, the Crow Tribal Court, and as to the exercise of the jurisdiction of that court for such a purpose, there is no federal common law, and so there is no jurisdiction in the Federal District Court to intervene. [1]

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[1] The construction based on *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816) falls of its own weight when as here there is no federal question raised. It is thus not necessary to go to a federal forum, nor permissible.

II. TRIBAL REMEDIES ARE EXCLUSIVE IN THE FACTS OF THE INSTANT CASE; INTERVENTION BY THE FEDERAL COURT IS UNWARRANTED

In *Williams v. Lee*, 358 U.S. 217 (1959) this Court held that exclusive jurisdiction was in the tribal court for a non-Indian merchant who conducted business on the reservation and who was attempting to collect a debt from a reservation Indian. In *Fisher v. District Court*, 424 U.S. 382 (1976) this Court held that a state court did not have jurisdiction over an adoption proceeding involving tribal members who resided on the Northern Cheyenne Reservation, explaining: "The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law . . ." *Id.* at 390.

As the United States Supreme Court observed in *Montana v. United States*, 450 U.S. 544 (1981), Indian tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565. Commercial dealing, contracts, leases or other arrangements are the activities that form the basis of the tribe's regulatory power. *Id.* In addition the *Montana* Court recognized tribes may have inherently retained civil authority over non-Indians' conduct on fee lands within the reservation when such conduct affects the political integrity, economic security or tribal health or welfare. *Id.* at 566. Jurisdiction in tribal court over non-Indian defendants has been recognized in other regulatory contexts: *Babbitt Ford, Inc. v. The Navajo Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, _____ U.S. _____, 104 S.Ct. 1707 (1984) (tribe may exercise civil jurisdiction over non-Indians conducting an automobile repossession on reservation; federal question jurisdiction based on the extent to which treaties and federal case law divest the Navajo Tribe of power to exercise civil jurisdiction over non-Indians conducting repossessions on reservation land); *Ashcroft v. United States Department of the Interior*, 679 F.2d 196 (9th Cir. 1982),

cert. denied, 459 U.S. 1201 (1983) (businesses conducted on non-Indian fee lands within the exterior boundaries of the Navajo reservation subject to regulations enacted by the Secretary of the Interior pursuant to Indian traders statutes; federal question jurisdiction based on Indian trader statutes); and *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982) (tribe had the power to enforce its building, safety and health regulations against non-Indian operator of a store on fee land on reservation; federal question jurisdiction based on federal common law on regulatory jurisdiction drawn from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Only when "absolutely necessary for protection of constitutional rights" (*Younger v. Harris*, 401 U.S. 37, 45 (1971)), do federal courts interfere in pending state court proceedings. Petitioners have tribal court remedies available to them, and they have not chosen to avail themselves of those remedies. Intervention by the federal court at this point in the proceedings would be analogous to federal court intervention in state court proceedings. As a matter of comity such intervention has, with the *Younger v. Harris*, *supra*, exception noted above, not been sanctioned. See *Webb v. Webb*, 451 U.S. 493 (1981).

The principles behind federal court restraint apply with equal force to tribal court proceedings and mandate that the Crow Tribal Court be allowed to have the opportunity to resolve a dispute that it clearly has jurisdiction over and to preserve the "right of reservation Indians to govern themselves." *Williams v. Lee*, 358 U.S. 217, 223 (1959). There has been no showing by petitioner that the great and immediate irreparable injury required by *Younger v. Harris*, *supra*, is present to require federal intervention, if intervention is permissible at all.

CONCLUSION

Absent settled federal common law, federal question jurisdiction can be based only on such "... laws ... of the United States" as have been enacted in statutes of the United States. It is not for the Court to conjecture as to what statutes Congress would enact had Congress concerned itself with the questions of tribal court civil jurisdiction over private tort litigation. It is solely within the power of Congress to create federal Indian policy and to direct the manner of its enforcement. The judgment of the circuit court ought to be affirmed.

Respectfully submitted,

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